BRUSSELS IV – TIME FOR A REVIEW

On 17 August 2015 EU Regulation 650/2012 came into force. The regulation has become known as Brussels IV because of where it sits in a series of regulations on conflict of laws and Private International Law within the EU.

Close to 450,000 cross border successions occur in the EU every year with a total estimated value of more than €123 billion. Families with assets situated in different EU states must navigate a myriad of conflicting laws on the division and distribution of an estate (often with the help of expensive professional advice). The aim of Brussels IV is to unify and simplify the laws of succession across the EU. Whether the regulation will achieve its objective is for the academics to decide but for now we consider the practical steps individuals should be taking to ensure they are not tripped up by it.

One must not assume that just because the UK (as well as Ireland and Denmark) has opted not to implement the regulation in its domestic law, there will not be some unexpected and potentially costly consequences for UK nationals who do not consider whether it affects them.

What does Brussels IV say?

Brussels IV states that the default position is that it is the law in which the deceased was **"habitually resident"** (which needn't be an EU member state) that should apply on succession. Habitual residence is determined by reference to *an overall assessment of the circumstances of the life of the deceased during the years preceding his death and at the time of his death, taking account of all relevant factual elements, in particular the duration and regularity of the deceased's presence in the State concerned and the conditions and reasons for that presence* (Recital 23).

It is possible for the testator to make a clearly documented express election contrary to his habitual residence and **choose for the governing law of where he is a national to apply**.

Additionally article 21 provides that *where it is clear from all the circumstances of the case that, at the time of death, the deceased was manifestly more closely connected with (another) State* then those laws will apply.

It applies to assets situated in all 25 of the 28 member states who have signed up to Brussels IV.

What does Brussels IV not say?

Brussels IV does not cover tax so the tax position will not necessarily follow the succession position and there may be double tax treaty issues.

The interaction between Brussels IV and marital property regimes is a relative unknown and great care must be taken with respect to the creation of trusts where an individual opts to apply (or by default applies) the governing law of a civil law state that does not recognise trusts.

What should you do now?

- If you are a UK national living abroad it may be wise to review your will to ensure that there is an election to apply UK law with respect to your entire estate if you wish to retain testamentary freedom.

- If you are UK national with assets abroad and do not want these assets to be subject to a forced heirship regime then again such an election may be desirable particularly if a property is held under a tenancy in common.

- If you have made lifetime gifts which may be subject to claw back under the domestic law of many EU states then the importance of this election cannot be overemphasised.

- If you are a non UK national living in the UK you may want to check any pre-arrival planning and any non UK wills to ensure that your property passes to the intended beneficiaries.

- Speak to your advisers to ensure that there are no unintended consequences of Brussels IV.

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